UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMI/DIVISION OF DCX-CHOL ENTERPRISES, INC.,	)	
	)	
	)	Case No. 25-CA-117090,
and	)	et al.
	)	
INDIANA JOINT BOARD, RETAIL, WHOLESALE, DEPARTMENT STORE UNION, UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 835, A/W DETAILS, WHOLESALE, DEPARTMENT STORE UNION, UNITED FOOD & COMMERCIAL WORKERS UNION,	)'	

RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

The Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (the "Union") filed seven separate charges against the Respondent, SMI/Division of DCX Chol Enterprises, Inc. ("DCX"). In 2013, DCX purchased the assets of Stuart Manufacturing, Inc. and took over its operations and inherited the Collective Bargaining Agreement (the "CBA") between Stuart Manufacturing and the Union. On April 30, 2014, the General Counsel issued a complaint addressing six charges against DCX and on June 9, 2014, the General Counsel issued a consolidated complaint covering all seven cases.

On September 23, 2014, the ALJ found that (1) DCX violated Section 8(a)(5) and 8(a)(1) of the Act by denying the Union access to DCX's facility on August 22, 2013; (2) that DCX violated Section 8(a)(1) of the Act by threatening employees that DCX would divide into two separate companies, one union and one non-union; (3) that DCX violated Section 8(a)(5) and

8(a)(1) by having the temerity to give all employees a $100 bonus in appreciation of obtaining a production goal in October 2013; (4) that DCX violated Section 8(a)(5) and 8(a)(1) by withdrawing recognition from the Union and declining to bargain when DCX had a decertification petition in hand; and (5) in April 2014, DCX unilaterally changed the pay dates without bargaining with the Union in violation of Section 8(a)(5) and 8(a)(1) of the Act.

The Administrative Law Judge declined to rule on the General Counsel's alternative theory that DCX's decision to withdraw recognition from the Union based on claimed loss of majority supported was tainted by the presence of significant, unremedied unfair labor practices. (ALJ Order at 22n.23).

On October 21, 2014, the General Counsel filed exceptions to the decision of the Administrative Law Judge arguing that the Administrative Law Judge erred in failing to rule on General Counsel's allegation that DCX violated the Act by withdrawing recognition from the Union because the claimed loss of majority support was tainted by the presence of significant, unremedied unfair labor practices.

II. STATEMENT OF FACTS

A. Sale of SMI to DCX and Current Relationship of Lionel Tobin/SMI to DCX

Stuart Manufacturing, Inc. ("SMI") was a minority-owned business owned by Lionel Tobin ("Tobin"). (Tr. at 17, 19). Because of its status as a minority-owned business and its location in a "HUB Zone," SMI was entitled to preferential treatment on certain government contracts. (*Id.* at 19-20).

On or around August 9, 2013, DCX-CHOL Enterprises ("DCX") purchased SMI's assets in an asset sale. (*Id.* at 18). At no point during negotiations over the asset purchase agreement

was there any discussion about constructing a nonunion facility in the plant. (*Id.* at 38). After the sale closed, all of the SMI employees except for Tobin went to work for DCX. (*Id.* at 20).

DCX is a corporation comprised of several locations, with operations in California, Illinois, and Indiana. (*Id.* at 76). DCX is not a minority owned business or qualified as a "HUB Zone" employer. (*Id.* at 19). Because DCX is not a minority-owned business, it was not entitled to specific government contract incentive programs. (*Id.* at 35). Additionally, because DCX did not meet the requirements as a "HUB Zone" employer, it was also ineligible to receive the benefits of such an employer. (*Id.* at 24). Because DCX was not a minority-owned business and did not qualify as a HUB zone employer, it could not service some of the contracts that SMI had serviced. (*Id.* at 24).

After the asset sale closed, Tobin had planned to continue operating as SMI, hoping to eventually rent space and equipment from DCX so SMI could service some of the customers that DCX (as a non-minority-owned, non-HUB zone business) could not service. (*Id.* at 20, 25). Because DCX could not service all of the contracts that SMI had serviced, Tobin anticipated that DCX would need to lay off employees. (*Id.* at 26). Tobin planned to employ laid-off DCX employees to work at his newly-formed venture. (*Id.* at 26). After the asset sale closed, Tobin was not an employee of DCX, and had no contractual relationship with DCX. (*Id.* at 34).

Tobin interviewed approximately fifteen DCX employees to gauge their interest in working for his potential new venture. (*Id.* at 26). When speaking to employees, Tobin indicated that he did not anticipate any changes from the conditions of employment they received as DCX employees. (*Id.* at 27-28). Tobin also did not indicate to interviewees that he was going to build a nonunion facility in the plant. (*Id.* at 38). Tobin did not have a preference for his new company to be union or nonunion. (*Id.* at 29). There was never any discussions between Tobin

and DCX, either before or after the asset sale was finalized, that Tobin was going to build a nonunion facility. (*Id.* at 38). Joe Horton, one employee interviewed by Tobin, expressly denied that Tobin had indicated that a functioning company existed, or that Tobin was going to open a nonunion facility. (*Id.* at 215). Tobin has not hired any employees because DCX and SMI have not been able to come to an agreement. (*Id.* at 25).

Although Tobin received payment for work performed by DCX after the transaction had closed because of a technicality in the way the government processed payments, he directs these funds directly to DCX. (*Id.* at 31, 40-41). As of the date of trial, DCX and SMI have not arrived at any agreement for the lease of property or equipment or any consulting agreement, and SMI has hired no employees. (*Id.* at 33). Tobin has never been employed by DCX. (*Id.* at 34). Tobin has no input into DCX's operations regarding strategy, marketing, or new business opportunities. (*Id.* at 37). In fact, the relationship between SMI and DCX is presently somewhat strained, with the potential of litigation. (*Id.* at 39).

B. DCX's Post-Closing Relationship with the Union

SMI was a union shop represented by the Union. (*Id.* at 105). SMI and the Union had negotiated a collective bargaining agreement ("CBA"), which governed the terms and conditions of the employment of SMI's bargaining unit employees. (Joint Exh. 1). The CBA was to expire in February 2014. (Tr. at 53, 128). After the asset sale closed, DCX made no initial changes to the terms and conditions of the employees. (*Id.* at 48). DCX's Fort Wayne, Indiana location is the only location that is unionized. (*Id.* at 54).

In a letter dated August 19, 2013, SMI notified Union President David Altman ("Altman") of the change in ownership, explaining that DCX had purchased SMI's assets. (Joint Exh. 2). DCX indicated its understanding that it became a successor, and that it would request

various modifications to the bargaining unit agreement in order to effectively and successfully manage the operations. (Joint Exh. 2).

After the transaction, DCX was essentially paying double to its third party payroll vendor—it paid once to process the Fort Wayne location's payroll, and once to process the remaining locations' payroll. (Tr. at 67-68). In an effort to cut unnecessary costs, DCX wished to place all company facilities on the same payroll schedule so that it paid to process only one payroll. (*Id.* at 68).

On or around August 19, 2013, Carol Goods-North ("Goods-North") [1] met with Altman to discuss the asset sale. (*Id.* at 50-51). DCX's Vice President and General Manager of the SMI Division of DCX, Gerald Pettit ("Pettit")[2] was also present at this meeting. (*Id.* at 52). At this meeting, DCX's Vice President of Human Resources, Goods-North, indicated to Altman that the pay dates SMI had been using and DCX's pay dates were different, and that pay dates may need to change. (*Id.* at 52). Altman indicated that he did not think that the change in pay dates would be much of a problem, but that the members would probably have to vote. (*Id.* at 53).[3]

On or around August 22, 2013, at the end of a meeting between Altman, Goods-North and Pettit, Altman asked to meet with employees in the break room. (*Id.* at 86). Pettit indicated that it was not a good time to meet because DCX had some production goals to obtain and deadlines to meet. (*Id.* at 86). The asset sale was still relatively new, and concrete information was not available. (*Id.* at 86). Pettit did not want to distract employees with speculation regarding the deal. (*Id.* at 59, 87). Before the August 22, 2013 meeting and before the asset sale, SMI had previously denied Altman access to the break room when the timing was not

[1] Before the asset sale, Goods-North had been SMI's Director of Human Resources (Tr. at 43).
[2] Before the asset sale, Pettit had been Vice President of Operations for Stuart Manufacturing.
[3] The pay dates did not change until approximately April, 2014 (Tr. at 62).

convenient. (*Id.* at 56-57). There is no evidence that Altman made a charge of unfair labor practices as a result of such exclusions at that time. Since the August meeting, Altman has not been denied access to the break room. (*Id.* at 95).

The Fort Wayne facility was having financial difficulties and was trying to recover and become profitable again. (*Id.* at 91). In the fall of 2013, DCX president Neil Castleman set a goal for the Fort Wayne facility of $1 million in a month—a level at which he felt the Fort Wayne facility could be profitable. (*Id.* at 87, 91). This figure had not been achieved by the Fort Wayne facility for quite some time. (*Id.* at 244). When announcing the production goal to management and supervisors, Castleman did not mention anything about a potential incentive payment for reaching the production goal. (*Id.* at 91-92). In October, 2013, the Fort Wayne facility met this production goal, which was a significant achievement, because the business had been struggling. (*Id.* at 87, 246). At the end of the month, Castleman congratulated Pettit on the facility's attainment of the $1 million production goal. (*Id.* at 88). To spontaneously thank employees for their contribution to reaching this goal, Castleman asked Pettit to give all employees a crisp $100 bill. (*Id.* at 88). DCX had also given such a cash bonus at its other facilities. (*Id.* at 69).

At a companywide meeting on or around Monday, November 4, 2013, Pettit announced that Castleman wanted to reward all of the employees for doing a good job that month. (*Id.* at 88-89). On the following Monday *all employees*—both bargaining unit employees and non-bargaining unit employees—received $100 bills. (*Id.* at 89, 93, 213, 246). Union committee members were present when the $100 gift was announced, but did not object to receiving gift. (*Id.* at 94). No Union member objected to receiving the $100 or returned it. (*Id.* at 93-94, 214).

Union vice president Joseph Horton and Union chair Jamarcus Tinker perceived nothing inappropriate about the receipt of the $100. (*Id.* at 214, 232).

C. Past Practice of Distributing Non-Negotiated Gifts

In or around August 2013, DCX had planned for its other divisions to attend a movie. (*Id.* at 49). DCX's then-director of human resources was in town and asked Goods-North if she believed that the Fort Wayne location's employees would like to see the movie as well. (*Id.* at 49). While Goods-North herself did not wish to see the movie, she thought it might be a good thing since everyone in the company was doing it—regardless of the location or membership in the bargaining unit. (*Id.* at 49-50). Employees were asked if they were interested in attending the moving and to inform their supervisor if they would like one or two tickets. (*Id.* at 50). Both bargain unit and management employees attended the movie. (*Id.* at 179).

Before the asset sale, SMI handed out turkeys each year at Thanksgiving. (*Id.* at 97, 180). SMI never negotiated with the Union over the decision to hand out turkeys to each employee. (*Id.* at 98, 211). SMI also hosted company picnics, prizes, and raffles, which were never negotiated with the Union. (*Id.* at 97-98). Both before and after the transaction, DCX has provided its employees with incentive awards at its other locations. (*Id.* at 69, 73)

D. Decertification Petition

Bargaining unit member Michelle Stump filed a decertification petition on or around August 28, 2013. (*Id.* at 251-52). Stump believes that the petition was denied because of a timing issue. (*Id.* at 252). Stump refiled her decertification petition on November 12, 2013. (*Id.* at 163, 252, Resp. Exh. 1). No vote has occurred on the decertification petitions, likely because of the blocking charges presently at issue. (Tr. at 161-62, 252).

Twenty-eight or twenty-nine members of the approximately fifty-four member bargaining unit signed the decertification petition. (Tr. at 252-53, Resp. Exh. 1). Stump talked to employees in the parking lot and informed them that she had a petition for signature if they wished to get rid of the Union. (Tr. at 253). No one from DCX threatened or coerced Stump into filing the petition or provided her with additional benefits for doing so. (*Id.* at 253). Stump did not receive any benefits from gathering signatures for the decertification. (*Id.* at 253). Stump never walked around the facility seeking signatures for the decertification. (*Id.* at 257). Stump never heard from any of the employees that they were afraid that if the Union stayed the company would close. (*Id.* at 257-58).

E. DCX Learns of Decertification Petition and Questions Union Support

In November or December of 2013, the Union requested to bargain for a new contract, as the existing CBA expired in February of 2014. (*Id.* at 53). In early December, 2013, Pettit found a decertification petition on his office chair. (*Id.* at 95-96). Pettit did not inquire about, request, or encourage the filing of a decertification petition. (*Id.* at 96). After receiving this petition, DCX did not believe that the Union had the majority of the employees' support. (Joint Exh. 3). In a letter to the Union dated January 3, 2014 DCX explained that it was in possession of a document signed by the majority of DCX bargaining unit employees indicating that they did not wish to be represented by the Union going forward. (*Id.*). While DCX indicated its willingness to honor the effective CBA, it stated its belief that it was legally obligated to honor the employees' decertification petition and could not negotiate for a contract that would cover a period of time within which the Union no longer represented the employees. (*Id.*). Notably, DCX requested that the Union provide it with case law if it believed that DCX was in error of its

legal analysis. (*Id.*). The Union never provided DCX with any information suggesting that DCX was legally obligated to bargain with the union. (Tr. at 169).

III. DCX'S RESPONSE TO THE GENERAL COUNSEL'S EXCEPTIONS

The Administrative Law Judge declined to consider the General Counsel's argument that DCX could not withdraw recognition because significant unremedied unfair labor practices existed. (ALJ Order at 22n.23). The General Counsel asserts that an employer cannot avoid its duty to bargain with a union by relying upon the loss of a majority that is attributable to its own unfair labor practices. (General Counsel Brief in Support of Exceptions at 9). As the General Counsel recognizes, there must be a "causal relationship" between the disaffection of the employees and the unfair labor practices. (*Id.*). In other words, "the unfair labor practices must have caused the employee disaffection here or at least had a 'meaningful impact' in bringing about the disaffection." *Master Slack Corp.*, 271 NLRB No, 15, 271 NLRB 78, 84 (1984).

There is a general presumption that the Union enjoys majority status but "it can be rebutted by the employer's production of evidence that it had a good faith belief that the Union no longer enjoyed majority support." *Aguayo v. American Red Cross,* 2000 WL 33260711 at *3 (S.D.Cal. 2000). DCX came forth with such evidence in the form of unsolicited and unprompted petitions for decertification. *See, e.g., Tenneco Automotive, Inc. v. N.L.R.B.,* 716 F.3d 640, 648 (D.C.Cir. 2013) (Finding that a petition for decertification signed by a majority of the employees was objective evidence that a union has lost majority support). Once DCX came forward with this evidence, "the burden shifts to the Board to come forward with evidence that the decline in union support was attributable to the employer's commission of unfair labor practices." *Aguayo,* 2000 WL 33260711 at *3. If the General Counsel "cannot affirmatively prove an unlawful

'taint,' the employer prevails." *Id.* The General Counsel has wholly failed to present any evidence to meet its burden.

A. Denial of Access

The General Counsel relies on supposed unfair labor practices by DCX but completely fails to establish a causal connection between the purportedly unfair labor practices and any employee disaffection. For example, the General Counsel contends that on August 22, 2013 DCX unlawfully denied the Union access to its bargaining unit employees, despite the fact that DCX acted consistently with the CBA.[4] (General Counsel's Brief in Support of Exceptions at 10). The General Counsel attempts to establish a causal connection between the denial of access and the decertification provision, nothing that it was the same day (August 22, 2013) that eleven employees signed the decertification petition. (*Id.*).

Notably, the General Counsel never called a single witness who testified that because he or she was unable to meet with Altman on August 22, 2013, his or her feelings toward the Union lessened or that was a motivating factor behind the decertification petition. In fact, the General Counsel's argument proves the opposite point. Is the General Counsel arguing that because Altman did not meet with the employees on August 22, 2013, a petition was circulated and eleven employees signed it *that very day*? Clearly, the petition had been in the works prior to August 22, 2013. Moreover, the General Counsel has wholly failed to establish that the Union was precluded from access to DCX's facilities on August 23, August 21, or any other day. The General Counsel has failed to demonstrate that because Altman did not visit with the employees that the employees became disillusioned with the Union.[5]

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[4] The General Counsel's Brief erroneously states that the denial of access occurred on August 22, 2014. (General Counsel's Brief in Support of Exceptions at 10).

[5] This evidence would have been relatively easy to produce and the fact that it was not should lead the Board to conclude that such evidence does not exist.

B. Threat of Two Companies

The General Counsel also argues that DCX'x unlawful threat to divide the company into a nonunion and union company occurred on October 16, 2013 and contributed to the Union's loss of support. (General Counsel's Brief in Support of Exceptions at 10). Again, the General Counsel offers no evidence of a causal connection between this statement and any employee disaffection. Not one single employee testified that this prospect concerned them or lessened their feelings for the Union. Not one single employee testified that they were urged to leave DCX, the Union, or placed in fear of their job.

1. $100 Bonus

The General Counsel also claims that DCX gave employees an "unprecedented" cash bonus of $100 on November 4, 2013.[6] The General Counsel contends that the "impact of this bonus was **clearly** demonstrated" when only three employees went to a union meeting later that same day. (General Counsel's Brief in Support of Exceptions at 10, emphasis added). How was the impact clearly demonstrated? As an initial matter, the union meetings typically only drew 8-15 employees AND the time of this particular meeting had been changed the day of the meeting.[7] The General Counsel fails to mention this fact which is the probable reason for the low turnout. Further, at the risk of being redundant, the General Counsel had the opportunity to call witnesses who would testify that after receiving $100.00 they saw no reason to attend the Union meeting, for whatever reason. Not one single witness so testified. In the absence of any evidence, the General Counsel simply asks the Board to speculate, presenting the $100 bonus as the reason

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[6] The cash bonus was only "unprecedented" at this facility as it was undisputed that DCX had given similar cash bonuses at its other facilities. Further, it was only "unprecedented" because DCX had been operational at this facility for less than 90 days.

[7] A Petition for Decertification had already been filed at this time which may also have contributed to the low turnout.

only three employees attended the Union meeting as a self-evident truth needing no evidence.[8] But the conclusion is not self-evident – the relatively low attendance could be blamed on the fact that the meeting time was changed that very day, the weather, the fact that the employees were dissatisfied with the Union for wholly independent reasons, or any one of numerous factors. It was the obligation of the General Counsel to present evidence on this fact and the General Counsel wholly failed to do so.

The General Counsel concludes that since DCX "became the owner of the facility, the employees have seen the Union be weakened by Respondent's unlawful unilateral changes." (General Counsel's Brief in Support of Exceptions at 11). It is the word "by" that dooms the General Counsel's argument. There was absolutely no evidence presented that any of the practices of DCX weakened the employee's faith in the Union. The General Counsel instead asks the Board to speculate – an invitation which the Board should and must decline. *See N.L.R.B. v. Clinton Electronics Corp.*, 284 F.3d 731, 738 (7th Cir. 2002) (Speculation is not evidence to support the Board's determination).

IV. CONCLUSION

Based on the foregoing, DCX respectfully requests that the General Counsel's Exceptions be overruled in their entirety.

[8] In fact, Jamarcus Tinker, a Union chair, testified that he saw nothing wrong with the cash bonus and did not feel that it was inappropriate. (Tr. at 214, 232).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been filed electronically through the E-filing Program this 4th day of November, 2014. On the same date a copy of said filing was served by electronic mail upon the following persons:

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The undersigned hereby certifies that on this 4th day of November, 2014, a copy of said filing was served by electronic mail upon the following persons:

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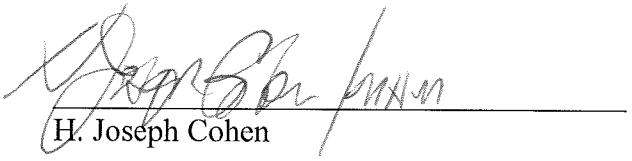

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